AMBANK (M) BHD

v.

PENTADBIR TANAH DAERAH GOMBAK & ANOTHER CASE

HIGH COURT MALAYA, SHAH ALAM
VERNON ONG J
[ORIGINATING MOTION NO: 25-115-07-2012 & 24-1116-09-2012]
10 MARCH 2014

LAND LAW: *Administration - Appeals and remedies - Alienation of plots of land to registered proprietor with condition - Land administrator issued statutory Form 7A and 7B notices to remedy alleged breach of condition - Appeal to set aside statutory forms - National Land Code, s. 418 - Form 7A notices specified action required for remedying breach - Whether within definition of 'direction' under s. 418(3) NLC - Whether issuance of Form 7A and 7B notices bona fide - Whether time period stipulated in Form 7A notices reasonable within context of s. 128(1)(b) NLC - Whether decision tainted with Wednesbury unreasonableness - Whether Form 7A and 7B notices set aside*

CIVIL PROCEDURE: *Parties - Locus standi - Whether registered chargee's interests in land affected by land administrator's decision - Whether debenture holder who had fixed charge over lands a person aggrieved - Whether aggrieved party entitled to exercise its statutory right of appeal*

Delpuri Corporation Sdn Bhd ('Delpuri') was the registered proprietor of three plots of land ('Plots A, B and C'). In 2003, the State Authority alienated Plots A, B and C to Delpuri as part of the State Authority's policy for the resettlement of squatters. The alienation of the plots to Delpuri was subject to the condition that Delpuri was required to construct 428 units of middle cost apartments. Delpuri charged Plots A and B to Ambank (M) Bhd ('Ambank') as security for repayment of three banking facilities. When Delpuri defaulted in the repayment of the banking facilities, Ambank exercised its rights under the debentures to appoint a receiver and manager ('R&M') over Delpuri. After the R&M was appointed, various steps were undertaken to revive the said construction. On 18 June 2012, the respondent issued Form 7A notices to Delpuri under s. 128 of the National Land Code ('NLC') in respect of Plots A and B, specifying that there was a

breach of condition due to the failure to construct the apartment buildings within two years under s. 116 of the NLC. Delpuri was required to remedy the breach by completing the construction of the apartments that met the standards of the authorities within 14 days. On 26 June 2012, the R&M wrote to the respondent applying for an extension of time but there was no response. On 19 July 2012, the respondent issued the Form 7B notices to Delpuri to show cause why the plots should not be forfeited. Subsequently, Delpuri and Ambank, as applicants, applied under s. 418 of the NLC to set aside the two statutory Form 7A notices and the three statutory Form 7B notices. Delpuri argued that the Form 7A notices and the 14 day deadline imposed were completely unreasonable, irrational and not *bona fide*. Delpuri further submitted that there was no breach since there were buildings which were constructed on Plots A, B and C which had fulfilled the purpose within the meaning of sub-s. (4) of s. 116 NLC. As for Ambank, it argued that as a registered charge and a debenture holder that had a fixed charge over Plots A and B, Ambank had the *locus standi* to appeal against the decision of the respondent. It was also submitted for Ambank that the respondent's actions in subsequently issuing the Form 7B notices and subsequent endorsement on the issue documents of titles had clearly prejudiced Ambank's efforts to revive the development on Plots A and B. The respondent, however, argued that there was no irregularity in the issuance and service of the Form 7A and 7B notices on Delpuri and even if there was any irregularity, s. 134(2) NLC provides that no irregularity is liable to be set aside by the court. The respondent further submitted that Ambank did not have the *locus standi* to commence the present action and Ambank as the registered chargee of Plots A and B had no legal obligation to observe all conditions on the land express or implied. The principal issues that arose were (i) whether the issuance of the Form 7A and 7B notices were *bona fide* in the circumstances; and (ii) whether the time period stipulated in the Form 7A notices was reasonable within the context of s. 128(1)(b) NLC.

Held (allowing appeals with costs):

(1) The appeals herein were statutory rights of appeal enacted by s. 418 of the NLC, which provides that any person aggrieved by any decision under the NLC of the State Director, the Registrar of any Land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the court.

'Decision' is defined by s. 418(3) of the NLC as including 'any act, omission, refusal, direction or order.' The Form 7A required Delpuri to take certain action to remedy an alleged breach of a condition affecting the use of Plots A and B. Accordingly, the Form 7A notices issued pursuant to s. 128 NLC specifying the action required to be taken for remedying the breach in question was a direction within the definition as being a 'direction' under s. 418(3) NLC (*Garden City Development Bhd v. Collector of Land Revenue*; refd.) (paras 32-34)

(2) As Ambank was the registered chargee of Plots A and B and a debenture holder that had a fixed charge over Plots A and B, it was clear that Ambank had an interest in Plots A and B; and as such, Ambank's interest would be affected by the decision in question. Accordingly, Ambank was also a person aggrieved by the decision and therefore was entitled to exercise its statutory right of appeal against the decision in question. (para 35)

(3) The implied condition imposed under s. 116 NLC is a 'condition subject to a fixed term' under s. 103 NLC. It was clear that time shall be of the essence in respect of the two year period stipulated in the issue documents of title to Plots A and B. Notwithstanding that, the respondent did not take any action to enforce the breach of the implied condition. Instead, Delpuri was given the opportunity to continue with the development of the project even after the two year period had lapsed. As there was no endorsement of a note of any extension of time granted on the register document of title, the court found that no extension of time was granted by the respondent for the compliance of the implied condition (s. 107(1) NLC). Accordingly, there was no evidence to substantiate the allegation that the issuance of the Form 7A notices was not *bona fide*. (paras 41, 43 & 46)

(4) It could not be gainsaid by any stretch of the imagination that the erection of the apartment buildings in Plots A and B could have been completed within a period of 14 days. The imposition of the 14 day deadline was an arbitrary act; clearly it was not based on any proper consideration or appreciation of the surrounding circumstances and facts. It was a decision which was in defiance of logic. If the respondent had applied his mind to it, he would not have arrived at it. As such the

A decision was so irrational that it was bound to fail the *Wednesbury* unreasonableness test. As a consequence of setting aside the Form 7A notices, it followed that the Form 7B notices relating to Plots A and B were also set aside and cancelled. (paras 53, 54 & 57)

B

Case(s) referred to:

Ambank (M) Berhad v. Pentadbir Tanah Gombak [2013] 10 CLJ 87 HC ***(refd)***

Associated Provincial Picture Houses Limited v. Wednesbury Corp [1948] 1 KB 223 ***(refd)***

C *Garden City Development Bhd v. Collector of Land Revenue, Federal Territory [1982] CLJ 346; [1982] CLJ (Rep) 20 PC* ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 SC ***(refd)***

Lam Eng Rubber Factory (M) Sdn Bhd v. State Director, Kedah & Anor D *[1994] 1 CLJ 179 HC* ***(refd)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Tan Teck Seng v. Suruhanjaya Perkhidmatan Pendidikan [1996] 2 CLJ 771 CA ***(refd)***

United Malayan Banking Corp Bhd v. Pemungut Hasil Tanah, Kota Tinggi E *& Anor Case [1984] 2 CLJ 146; [1984] 1 CLJ (Rep) 51 PC* ***(refd)***

Legislation referred to:

National Land Code, ss. 5, 103, 107(1), 116(1)(a), (4), 128(1), 129, 134(2), 418(3)

F *For the plaintiff - Ahmad Fuad Othman; State Legal Advisor, Selangor*

For the 1st respondent - Andrew Chiew; M/s Lee Hishammuddin Allen & Gledhill

For the 2nd respondent - Lau Kee Sam (Tan Shu Shuen with him); M/s Shook Lin & Bok

G *For the 3th & 4th respondents - BS Teoh; M/s Vin & Isaac Lee*

Reported by Suhainah Wahiduddin

JUDGMENT

H

Vernon Ong J:

[1] The two applications herein are made under s. 418 of the National Land Code. They relate to two statutory Form 7A notices and three statutory Form 7B notices to the applicant to I remedy breach of condition and to show cause affecting two plots of land. On 4 December 2013, the court allowed the applications to set aside the statutory notices. The grounds of the decision are as follows.

Brief Account Of The Salient Facts

[2] The applicant in Action 1116 is Delpuri Corporation Sdn Bhd ('Delpuri') whilst the applicant in Action 115 is Ambank (M) Berhad ('Ambank'). Action 115 was consolidated with Action 1116 by an order of court dated 25 March 2013.

[3] Delpuri is the registered proprietor of three plots of land held under H.S.(D) 46617, PT 1238, H.S.(D) 48094, PT 1435 and H.S.(D) 46616 PT 1237 all in Bandar Selayang, Selangor (plots A, B and C respectively).

[4] In 2003, the State Authority alienated plots A, B and C alienated to Delpuri. According to the issue documents of title to the plots, the land use is "Bangunan" and express conditions "rumah pangsa untuk kediaman".

[5] The alienation of the plots to Delpuri were part of the State Authority's policy for the resettlement of squatters within the vicinity of Bukit Botak lands which included plots A and B.

[6] The alienation of the plots to Delpuri was subject to the condition that Delpuri was required to construct 428 units of transit apartments, 504 units of low cost apartments and 498 units of middle cost apartments which would be sold to Bukit Botak squatters.

[7] Delpuri charged plots A and B to Ambank as security for repayment of three banking facilities.

[8] When Delpuri defaulted in the repayment of the banking facilities, Ambank exercised its rights under the debentures to appoint a receiver and manager ('R&M') over Delpuri on 27 December 2011.

[9] When the R&M was appointed, the status of the development on plots A and B was:

(a) In respect of the eight blocks of 5-storey medium cost apartments ('Kristal apartments') in plot A, six blocks are substantially completed.

(b) In respect of the six blocks of medium low cost apartments ('Nilam apartments') in plot B, only two blocks have been completed. Two other blocks are 50% completed whilst the remaining two blocks is up to piling works.

These blocks are presently occupied.

[10] After the R&M was appointed, various steps were undertaken to revive the construction of the Kristal and Nilam apartments.

[11] On 18 June 2012 the respondent issued Form 7A notices to Delpuri under s. 128 NLC in respect of plots A and B. The Form 7A notices specified that there was a breach of condition due to the failure to construct the apartment buildings within two years under s. 116 NLC. Delpuri was required to remedy the breach by completing the construction of the apartments that met the standards of the authorities within 14 days.

[12] On 26 June 2012, the R&M wrote to the respondent applying for an extension of time. There was no response.

[13] The Form 7A notices were endorsed on the register document of title to the plots on 29 June 2012.

[14] On 19 July 2012, the respondent issue the Form 7B notices to Delpuri to show cause why the plots should not be forfeited.

[15] A land enquiry was scheduled to be held on 25 July 2012. The land enquiry proceeded on 25 July 2012 but was not completed. It was adjourned by the respondent pending the outcome of the proceedings herein.

Applicants' Case

Delpuri's Case (Form 7A Notices)

[16] The Form 7A notices were issued pursuant to s. 128 NLC on the grounds of Delpuri's breach of the implied condition of the lands in respect of plots A and B as stipulated under s. 116 NLC.

[17] Learned counsel for Delpuri argued that the Form 7A notices and the 14-day deadlines imposed are completely unreasonable, irrational and not *bona fide* on the following grounds:

(i) Delpuri had at all material times complied with the conditions imposed by the State Government of Selangor *vide* its letter dated 22 September 2000;

(ii) The alleged breach of s. 116 NLC is misconceived and untenable as the implied condition does not and cannot apply in the present case;

(iii) The delay in completing the construction of Kristal apartments and Nilam apartments was directly caused or resulted by the respondent's failure and/or liability in, *inter alia*, resolving the issues concerning the presence and continued presence of the squatters;

(iv) The respondent was fully informed and appraised of the constraints and the various concerted efforts which the R&M has made and will continue to make as the R&M in the receivership and administration of the charged assets of Delpuri, including the revival and completion of the proposed developments on plots A and B in the near future;

(v) It is virtually impossible for all the ongoing or uncompleted projects on plots A and B to be completed by Delpuri within the 14 day period; and

(vi) It is absurd and/or not *bona fide* for the respondent to require Delpuri to complete all the ongoing or uncompleted projects on plots A and B within the 14 day period.

Delpuri's Case (Forms 7B)

[18] It was also argued that the respondent failed to consider the R&M's appeal *vide* letter dated 26 June 2012 and instead proceeded to issue the Form 7B notices under s. 129 NLC to Delpuri requiring Delpuri to attend an enquiry to show cause why plots A, B and C should not be forfeited in favour of the State Authority for non-compliance of the Form 7A notices.

[19] It was also contended that the Form 7B relating to plot C should never have been issued as no Form 7A notice relating to plot C was issued or served by the respondent.

[20] Learned counsel for Delpuri argued that s. 116(1)(a) NLC does not apply to the circumstances of this case. Even if it did, there was no breach since there were buildings which were constructed on plots A, B and C which have fulfilled the purpose within the meaning of subsection (4) of s. 116 NLC.

Ambank's Case

[21] Learned counsel for Ambank argued that as a registered charge and a debenture holder that has a fixed charge over of plots A and B Ambank has the *locus standi* to appeal against the decision of the respondent.

[22] Secondly, it was also submitted for Ambank that the deadline imposed under the Form 7A notices was unreasonable and impossible for any person to perform. The respondent's actions in subsequently issuing the Form 7B notices and subsequent endorsement on the issue documents of titles have clearly prejudiced Ambank's efforts to revive the development on plots A and B.

[23] Thirdly, it was also argued for Ambank that there is no breach of the implied condition under s. 116 NLC. Whilst it is not disputed that the two year period had already lapsed, it is a fact that buildings have been erected on plots A and B. When Delpuri did not complete the construction within the original two-year period, the respondent did not take any steps to declare or enforce the breach. On the contrary, Delpuri was given the opportunity to continue with the development after the original two-year period had lapsed.

[24] Lastly, learned counsel for Ambank argued that the notice period under the Form 7A notices were unreasonable as it was impossible to perform and obviously designed for Delpuri to fail so that the respondent can proceed to issue the Form 7B notices.

Respondent's Reply

[25] Learned counsel for the respondent argued that Ambank did not have the *locus standi* to commence the present action. Ambank as the registered charge of plots A and B has no legal obligation to pay the rents and observing all conditions on the land express or implied. Its interests on plots A and B lies with the R&M only. Only the R&M had the legal capacity to institute the present action against the respondent.

[26] Learned counsel for the respondent submitted that the relevant procedures had been complied with by the respondent in issuing the Form 7A notices. As Delpuri was unable to remedy the breach within the 14 days deadline, the respondent proceeded to issue the Form 7B notices to show cause why plots A, B and C should not be forfeited to the State in accordance with s. 129 NLC. The enquiry was conducted by the respondent but due to the present application the decision of the inquiry was stayed.

[27] It was submitted that Delpuri had failed to build "rumah pangsa untuk kediaman" within two years from the date of registration pursuant to s. 116 NLC. The time period for the

erection of the buildings on plots A, B and C began from the date of the alienation (4 June 2003 and 3 November 2003) respectively. By November 2005, the construction of the apartments should have been completed. Warnings had been issued by the respondent and undertaking were made by Delpuri to comply with the deadline, but to no avail. It has been ten years from the date of alienation of plots A, B and C, but the apartment buildings did not satisfy the definition of 'building suitable for use' as provided under s. 116(1)(a) NLC. Delpuri's failure jeopardised the State's policy to help squatters, much to the detriment of the squatters (*Lam Eng Rubber Factory (M) Sdn Bhd v. State Director, Kedah & Anor* [1994] 1 CLJ 179).

[28] There was no irregularity in the issuance and service of the Form 7A and 7B notices on Delpuri. Further, Delpuri's representative(s) attended the enquiry which was held on 25 July 2012. Even if there was any irregularity, s. 134(2) NLC provides that no irregularity is liable to be set aside by the court (*United Malayan Banking Corp Bhd v. Pemungut Hasil Tanah Kota Tinggi & Anor Case* [1984] 2 CLJ 146; [1984] 1 CLJ (Rep) 51 PC).

Findings Of The Court

[29] The Form 7A notices in question were issued by the respondent pursuant to s. 128(1) NLC which provides as follows:

> 128. Summary action to secure remedying of breach of condition
>
> (1) Where:
>
> (a) any alienated land is liable under section 127 to forfeiture to the State Authority for breach of any condition; and
>
> (b) it appears to the Land Administrator that the breach is capable of being remedied by the proprietor within a reasonable time,
>
> the Land Administrator shall serve, or cause to be served, on the proprietor, a notice in Form 7A specifying the action required for remedying the breach, and calling upon him to take such action within the time therein specified.

[30] The relevant portions of the Form 7A notices relating to the breach and time specified for Delpuri to take action for remedying the breach are as follows:

A Bahawasanya saya yang bertandatangan di bawah ini adalah berpuas hati bahawa suatu pelanggaran syarat yang dijadualkan di bawah ini telah timbul iaitu:

Kegagalan membina bangunan iaitu rumah pangsa untuk kediaman (syarat nyata) dalam tempoh 2 tahun selaras dengan peruntukan
B syarat tersirat di bawah seksyen 116 Kanun Tanah Negara 1965

Maka, oleh yang demikian pada menjalankan kuasa-kuasa yang diberi oleh Seksyen 128 Kanun Tanah Negara, saya dengan ini menghendaki kamu dalam tempoh 14 hari dari tarikh penyampaian notis in supaya mengambil tindakan berikut untuk memulihkan
C pelanggaran tersebut:

Membina bangunan iaitu rumah pangsa untuk kediaman yang sempurna dan mematuhi piawaian pihak berkuasa.

D **[31]** For completeness, it will be necessary to reproduce s. 116 NLC which relates to implied conditions affecting land subject to category of "building" is reproduced below:

116. Implied conditions affecting land subject to category of "building"

E

(1) Where any alienated land is subject by virtue of any provision of this Act to the category 'Building", the following implied conditions shall, subject to subsection (3), apply thereto:

(a) *that, unless on the relevant date such a building already existed*
F *on the land, there shall within two years of that date be erected thereon a building suitable for use for one or more of the purposes specified or referred to in subsection (4);*

(b) that no part of the land shall be used for agricultural or industrial purposes (except in so far as the erection or
G maintenance of any building for a purpose or purposes falling within paragraph (for) or (g) of subsection (4) may constitute such a use);

(c) that every building thereon (whensover erected) shall be maintained in repair;
H

(d) that no such building shall be demolished, altered or extended with the prior consent in writing of the appropriate authority.

I (2) In subsection (1) "relevant date" means the date on which any part of the land first became subject to the category.

(3) The conditions specified in subsection (1) shall be implied in the case of any land to the extent only that they are not inconsistent with any express conditions to which the land is for the time being subject.

(4) The purposes referred to in paragraph (a) of subsection (1) are the following:

(a) residential purpose;

(b) administrative or commercial purposes, or the purpose of passenger transport;

(c) the purposes of exhibiting, selling by retail, repairing or otherwise dealing in any goods or commodities, or of providing any services;

(d) the purposes of providing educational, refreshment or recreation;

(f) any purpose which the State Authority may prescribe for the purposes of this section by rules under section 14;

(g) any purposes which the State Authority may think fit to authorise in the circumstances of any particular case;

(h) any purpose incidental to a purpose falling within any of the preceding paragraphs. (emphasis added)

[32] The appeals filed herein are statutory rights of appeal enacted by s. 418 NLC. Section 418 NLC provides that any person aggrieved by any decision under the NLC of the State Director, the Registrar or any Land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the court. Is the Form 7A notice to Delpuri a decision within the meaning for s. 418 NLC?

[33] 'Decision' is defined by s. 418(3) as including 'any act, omission, refusal, direction or order'. In this instance, the Form 7A requires Delpuri to take certain action to remedy an alleged breach of a condition affecting the use of plots A and B.

[34] Accordingly, the court holds that the Form 7A notices issued pursuant to s. 128 NLC specifying the action required to be taken for remedying the breach in question is a direction within the definition as being a 'direction' under s. 418(3) NLC (see *Garden City Development Bhd v. Collector of Land Revenue* [1982] CLJ 346; [1982] CLJ (Rep) 20; [1982] 2 MLJ 98 PC).

[35] As the registered proprietor of plots A and B, Delpuri is a person aggrieved by the decision in question. Is Ambank entitled to appeal against the decision as well? As Ambank is the registered chargee of plots A and B and a debenture holder that has a fixed charge over plots A and B, it is clear that Ambank has an interest in plots A and B; and that as such Ambank's interest will be affected by the decision in question. Accordingly, the court has no hesitation in holding that Ambank is also a person aggrieved by the decision and therefore is entitled to exercise its statutory right of appeal against the decision in question (*Ambank (M) Berhad v. Pentadbir Tanah Gombak* [2013] 10 CLJ 87).

Principal Issues For Determination

[36] On the facts of this case, the principal issues to be determined are as follows:

– Whether the issuance of the Form 7A and 7B notices were *bona fide* in the circumstances?

– Whether the time period stipulated in the Form 7A notices is reasonable within the context of para. (b) in subsection (1) of s. 128 NLC.

Whether The Issuance Of The Form 7A And 7B Notices Were Bona Fide In The Circumstances?

[37] The Form 7A notices referred to the breach of the implied condition under s. 116 NLC. The word 'building' is defined to include 'any structure erected on land' (s. 5 NLC).

[38] It is not disputed that as at date of the issuance of the Form 7A notices, there were buildings erected on plots A and B. The buildings comprised of various blocks of apartment buildings in different stages of completion.

[39] Delpuri was required to construct eight blocks (Blocks A to H) of five storey medium cost apartments on plot A. Most of the apartment units have been sold to third party purchasers under sale and purchase agreements which have been executed by Delpuri in 2003 and 2004. Based on the progress reports (exh. DC-23), architect certificate (exh. DC-26) and building certificates (exh. DC-14), Blocks B, C, D, E & G have been substantially completed.

[40] As for plot B, Delpuri has completed two out of the six blocks of medium low cost apartments. In fact, the two completed blocks of apartments are being occupied by approximately 160 squatter families. The two other blocks are 50% completed and the remaining two blocks are at piling stage.

[41] It is pertinent to note that the implied condition imposed under s. 116 NLC is a "condition subject to a fixed term" under s. 103 NLC. The relevant interpretation and scope of the said expression as defined under s. 103 is as follows:

> "Condition subject to a fixed term" means any condition which requires the proprietor of any land to do any act before, or refrain from doing any act until, the expiry of any particular period, or the occurrence of any particular date or event, specified in the condition.

[42] It is also pertinent to note that where any provision of the NLC imposes a condition subject to a fixed term, time shall be of the essence. This deeming provision is stipulated in s. 106 NLC which reads as follows:

> 106. Time to be of essence of fixed-term conditions of a positive character
>
> Time shall be deemed to be of the essence of every condition subject to a fixed term by which the proprietor of any land is required to do any act.

[43] By reason of the foregoing, it is clear that time shall be of the essence in respect of the two year period stipulated in the issue documents of title to plots A and B.

[44] Notwithstanding the above, the respondent did not take any action to enforce the breach of the implied condition. Instead, Delpuri was given the opportunity to continue with the development of the project even after the two-year period had lapsed. This is evident from the negotiations that took place on 16 March 2005 and 3 May 2005 between Delpuri, the respondent, the local councils and other related parties relating to the development; the discussions included issues relating to the presence of squatters remaining on the construction site.

[45] Delpuri's contention is that at all material times, the presence and continued presence of squatters on plot B has caused substantial delay and will continue to hinder the

completion of the construction of the apartments on plot B. Learned counsel for Delpuri also referred to a meeting held on 8 May 2012 between representatives of the Ministry of Housing and Local Government, the respondent wherein it was *inter alia* confirmed that the project on plots A and B are not classified by the Federal Government as abandoned project. The respondent failed to supply a list of squatters occupying on plots A and B.

[46] Be that as it may, as there is no endorsement of a note of any extension of time granted on the register document of title, the court finds that no extension of time was granted by the respondent for the compliance of the implied condition (s. 107(1) NLC). Accordingly, there is no evidence to substantiate the allegation that the issuance of the Form 7A notices was not *bona fide*.

Whether The Time Period Stipulated In The Form 7A Notices Is Reasonable Within The Context Of para. (b) In Sub-s. (1) Of s. 128 NLC?

[47] The issuance of a Form 7A notice is a summary action to secure the remedying of a breach of condition. The breach of condition relates to the non-completion of the apartments units in plots A and B.

[48] Paragraph (b) of s. 128(1) refers to the period the respondent considers to be a reasonable time in order for the breach to be capable of being remedied.

[49] Whether the period of 14 days provided in the Form 7A notices is a reasonable time for the breach is capable of being remedied depends on the circumstances of each particular case. In other words, it should be determined on a case to case basis.

[50] As a general rule, the imposition of the time frame for remedying a breach is a power conferred on the respondent. This is a power which confers a wide discretion on the respondent. The question is whether the power in this instance has been improperly exercised by the respondent when it made the decision to issue the Form 7A giving Delpuri 14 days to complete the construction of the remaining apartment units on plots A and B.

[51] A decision which falls on this ground is said to have failed the '*Wednesbury* unreasonableness' test (See *Associated Provincial Picture Houses Limited v. Wednesbury Corp* [1948] 1 KB 223). This

is a decision that is said to be so outrageous in its defiance of logic that no sensible person who had applied his mind to it could have arrived at it. It also involves a consideration of the principle of 'proportionality' *(Tan Teck Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261; *Kumpulan Perangsang Selangor v. Zaid Mohd Noh* [1997] 2 CLJ 11). It may also include decisions taken in bad faith, oppressively or based on considerations which have been accorded manifestly inappropriate weight, in addition to strictly irrational decisions which are illogical or arbitrary (*R Rama Chandran, supra*).

[52] The Federal Court adopted this principle in *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 FC. In that case the registered owner of a piece of freehold land (title in perpetuity) applied to the Federal Government for sub-division of the land and for conversion of the express condition relating to the use of a hotel for which planning permission had been granted. The registered owner was informed that the application would be approved on condition that after surrendering the land, the registered owner would receive back a lease of 99 years instead of title to the land in perpetuity. The registered owner applied to court for an order that the approving authority approve its application for subdivision upon the usual terms and conditions. The High Court gave judgment for the registered owner. On appeal the Federal Court held that the approving authority had no power to make the registered owner/applicant give up its freehold title and receive in exchange a 99 year lease. The condition was set aside. The condition in question which the registered owner objected to did not relate to the permitted development, it was unreasonable and was used for an ulterior object, the object being to bring developed land into line with newly alienated land as to which only leases not titles in perpetuity are granted. At p. 146 Suffian LP reiterated the following principles:

> I am of the opinion that English cases afford principles that may be followed here. What are the principles? They are:
>
> 1. The approving authority does not have an uncontrolled discretion to impose whatever condition it likes.
>
> 2. The conditions, to be valid, must fairly and reasonably relate to the permitted development.

A

3. The approving authority must act reasonably and planning conditions must be reasonable.

4. The approving authority is not at liberty to use its power for an ulterior object, however, desirable that object may seem to it in the public interest.

B

…

In reconsidering these applications, the Committee should act fairly and not arbitrarily. There must be no bad faith and no dishonesty, though in fairness to everybody concerned nobody has suggested that on the part of the Committee. There must be no

C

unreasonableness, no attention to extraneous circumstances, no disregard to public policy, and things of that sort – things mentioned by Lord Greene MR, at page 682 in *Associated Provincial Picture House v. Wednesbury Corporation.*

D

At p. 148, Raja Azlan Shah Ag CJ (Malaya) (as HRH then was) said:

... On principle and authority, the discretionary power to impose such conditions "as they think fit" is not an uncontrolled discretion to impose whatever conditions they like. In exercising their

E

discretion, the planning authorities must, to paraphrase the words of Lord Greene MR in *Associated Provincial Picture House v. Wednesbury Corporation* have regard to all relevant considerations and disregard all improper considerations, they must produce a result which does not offend against common sense: or to repeat

F

Lord Denning MR's words in *Pyx Granite Co. Ltd v. Ministry of Housing and Local Government*, approved in *Fawcett Properties Ltd v. Buckingham County Council* the conditions to be valid must fairly and reasonably relate to the permitted development. The *dictum* of Lord Denning MR has been frequently quoted and followed in these matters. See *R v. Hillingdon Council, Ex parte*

G

Royco Homes Limited. Lord Denning said (page 572):

The principles to be applied are not, I think in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit'. Nevertheless the law says that those conditions, to be valid,

H

must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use these powers for an ulterior object, however desirable that object may seem to them to be in the public interest.

I

…

> … Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place", (per Dankwerts LJ in *Bradbury v. London Borough of Enfield*.)

[53] Applying the principles enunciated above to the facts of this case, it cannot be gainsaid by any stretch of imagination that the erection of the apartment buildings in plots A and B could have been completed within a period of 14 days. It is an impossibility. The imposition of the 14-day deadline was an arbitrary act; clearly it was not based on any proper consideration or appreciation of the surrounding circumstances and facts.

[54] In the premises, it is a decision which is in defiance of logic. If the respondent had applied his mind to it, he would not have arrived at it. As such, the decision is so irrational that it is bound to fail the *Wednesbury* unreasonableness test. On this ground, the appeal against the decision of the respondent must be allowed.

[55] As a consequence of setting aside the Form 7A notices, it follows that the Form 7B notices relating to plots A and B are also set aside and cancelled.

[56] As for the Form 7B notice relating to plot C, there is no evidence to show that a Form 7A notice was issued or served on Delpuri prior to the issuance of the Form 7B notice in question. Further, there is no evidence to indicate that the respondent was of the opinion that the issuance of the Form 7A was not appropriate pursuant to para. (a) in sub-s. (1) of s. 129 NLC.

[57] At any rate, as the facts and circumstances to plot C are the same, it follows that the Form 7B is liable to be set aside and cancelled.

For the foregoing reasons the appeals are allowed with costs.